U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 03 239 55228 Office: CALIFORNIA SERVICE CENTER Date: AUG 10 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer software consulting firm. It seeks to employ the beneficiary permanently in the United States as an IT account manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition was accompanied by certification from the Department of Labor. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess the equivalent of an advanced degree as he did not hold a "United States baccalaureate degree or a foreign equivalent degree." The director also determined that the petitioner had not established its ability to pay the beneficiary's proffered wage.

On appeal, counsel asserts that the beneficiary possesses a foreign degree equivalent to a United States baccalaureate degree.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). Regarding the "equivalent" of an advanced degree, the regulations state: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

As the beneficiary possesses a foreign three-year bachelor's degree, the sole issue in this proceeding is whether that degree may be considered a "foreign equivalent degree" to a United States baccalaureate degree so that the beneficiary would have the equivalent of an advanced degree.

The record contains an approved Department of Labor Form ETA-750, Application for Alien Labor Certification (labor certification). Regarding the minimum level of education and experience required for the proffered position, Part A, item 14 of the labor certification indicates that the position requires a "Master's Degree Or Bachelor's Degree plus 5 years of progressive experience" in "Business Administration, Marketing, Management or related field."

The beneficiary received a Bachelor of Science degree in mathematics from AM Jain College, University of Madras, after three years of study. The original petition was accompanied by a credentials evaluation from the Foundation for International Services. In evaluating the beneficiary's Bachelor of Science degree, the evaluator stated that the beneficiary's college diploma "is equivalent to three years of university-level credit in mathematics from an accredited college or university in the United States."

After considering the beneficiary's university studies, the evaluator evaluated the beneficiary's additional training that he received after his bachelor's degree. The beneficiary completed a six-month course of study in "Export Management" in 1990; a three-month course of study in "Computer Applications" in 1996; and a six-month course in "Computer Applications" in 1998. There is no indication that the beneficiary's additional training took place at accredited institutions of higher education in India. Based on the record of proceeding, the beneficiary appears to have received the additional training through technical institutes.

The evaluator stated that the beneficiary's completion of "a six-month programme in Foreign Trade Management . . . is equivalent to completion of a professional training program offered by a private organization in the United States." The evaluator did not discuss the beneficiary's subsequent computer-related training in detail, but did acknowledge "three certificates equivalent to completion of professional training in the United States" along with the beneficiary's employment experience. Based on the beneficiary's combined education, training, and experience, the evaluator concluded:

> [The beneficiary] has the equivalent of . . . three years of university level credit in mathematics from an accredited college or university in the United States and has, as a result of his educational background and employment experiences (3 years of experience = 1 year of university-level credit), an educational background the equivalent of an individual with a bachelor's degree in computer science from an accredited college or university in the United States.

The director denied the petition, stating:

> The beneficiary does not have a United States advanced degree or foreign equivalent. Moreover, the beneficiary does not have a baccalaureate degree or its foreign equivalent. The beneficiary does have . . . three years of university-level credit in mathematics; this is less than a baccalaureate degree. There is no provision under this section allowing experience in conjunction with education of less than a baccalaureate degree to equate to an advanced degree.

Therefore, the director concluded, "the beneficiary is ineligible for classification as a member of the professions holding an advanced degree."

On appeal, counsel states: "On [the] Labor Certification application, the Petitioner did not indicate the Bachelor's degree must be issued from a four-year US university or must [be] equivalent to it. The Petitioner respects and accepts Bachelor's degree[s] from any accredit[ed] universities of other countries." 8 C.F.R. § 204.5(k)(4)(i) states that the job offer portion of the individual labor certification must demonstrate that the job requires a professional holding an advanced degree. 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

The regulations, cited above, clearly indicate that the baccalaureate degree must be equivalent to a United States baccalaureate degree. The petitioner is not at liberty to substitute its own, less stringent definition of what constitutes a baccalaureate degree. Furthermore, a principal purpose of the labor certification process is to protect United States workers. A U.S. worker who left a U.S. college after only three years would not qualify for the job offered, but a worker from India with exactly the same amount of education would qualify. Thus, the petitioner's policy is demonstrably biased toward individuals who attended colleges in India and other locales where a baccalaureate is considered to be a three-year, rather than a four-year degree.

A three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). According to India's Department of Education, the nation's educational degree structure provides for both three-year and four-year bachelor's degree programs. After 12 years of primary and upper primary school, a bachelor's degree in the arts, commerce, or the sciences may be earned after three years of higher education. A bachelor's degree in a professional field of study, such as

agriculture, dentistry, engineering, pharmacy, technology, and veterinary science, generally requires four years of education. *See generally* Government of India, Department of Education, *Higher Education in India, Academic Qualification Framework - Degree Structure,* (last updated October 1, 2001), *available at* http://www.education.nic.in/htmlweb/higedu.htm (printed copy incorporated into the record of proceeding). If supported by a proper credentials evaluation, a four-year baccalaureate degree from India could reasonably be deemed to be the "foreign equivalent degree" to a United States baccalaureate degree. However, in *Matter of Shah,* the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah* at 245. Based on the same reasoning, the beneficiary's three-year Bachelor of Science degree from the University of Madras will not be considered the "foreign equivalent degree" to a United States baccalaureate degree for purposes of this preference visa petition.

Counsel asserts that the beneficiary "has been given the equivalency of a US Bachelor's degree." The record offers no support for this claim. The evaluation submitted with the petition does not indicate that the beneficiary has earned any degree that is equivalent to a U.S. baccalaureate. Rather, the evaluator specifically indicated that the beneficiary's college education was equivalent to three years of undergraduate study. The evaluator then stated that the beneficiary's employment experience amounted, in effect, to the remainder of the study required for equivalency to a U.S. baccalaureate degree. The pertinent regulations, however, do not permit the substitution of experience for an actual degree that is, by itself, equivalent to a U.S. baccalaureate degree.

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service) responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (November 29, 1991) (emphasis added). There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act with anything less than a full baccalaureate degree. Although the preamble to the publication of the final rule specifically dismissed the option of equating "experience alone" to the required bachelor's degree, the same reasoning applies to accepting an equivalence in the form of multiple lesser degrees, professional training, incomplete education without the award of a formal degree, or any other level of education deemed to be less than the "foreign equivalent degree" to a United States baccalaureate degree. Whether the equivalency of a bachelor's degree is based on work experience alone or on a combination of multiple lesser degrees, the analysis results in the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. As noted in the federal register, persons who

claim to qualify for an immigrant visa by virtue of education or experience equating to bachelor's degree will qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. In addition, a combination of degrees which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree does not meet the regulatory requirement of a foreign equivalent degree.

As previously noted, the ETA-750 labor certification specifically requires a Master's degree in Business Administration, Marketing, Management or related field, or a Bachelor of Science in one of those fields and five years of experience. The petitioner has not claimed that the beneficiary possesses a United States Master's degree or a foreign equivalent degree. As previously explained, the petitioner has not established that the beneficiary possesses the minimum alternate qualifications, a Bachelor of Science degree with five years of experience, as the beneficiary's three-year Bachelor of Science degree is not a "United States baccalaureate degree or a foreign equivalent degree." Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act as he does not have the minimum level of education required for the equivalent of an advanced degree.

The other, independent basis for denial concerns the petitioner's ability to pay the beneficiary's proffered wage. We stress that failure to meet the burden of proof for either of these two issues – qualification for the classification, or ability to pay – would, by itself, be sufficient grounds for denial of the petition even if the other basis never came into play.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on May 17, 2001. The proffered wage as stated on the Form ETA 750 is $95,100 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary indicated that he has worked for the petitioner as a project leader since January 2001.

On the I-140 petition form, the petitioner claimed to have been established in 1990, to have a gross annual income of $1.3 million, net annual income of $10,000, and to currently employ 4 workers. In support of the petition, the petitioner submitted partial copies of its 2001 and 2002 corporate tax returns, containing the following information:

	2001	2002
Gross receipts	$1,796,522	$1,003,206
Total income [gross profit]	1,088,040	509,951
Taxable [net] income (loss)	46,274	(3,035)
Non-officer salaries and wages	603,437	297,184

The director, in denying the petition, stated "there is not enough proof of ability to pay the proffered wage [of] $95,100, because the taxable incomes for the two years (2001, 2002) are both less than the proffered wage." The director was correct to observe that the petitioner's income is substantially less than the proffered wage, but the director failed to take into account the claim that the petitioner has employed the beneficiary since January 2001. Therefore, it is at least conceivable that the amounts listed under "salaries and wages" on the tax returns could each include the full proffered wage paid to the beneficiary.

For a more definitive determination, the director would have had to have issued a request for evidence, to allow the petitioner the opportunity to show how much it had actually paid the beneficiary during the years in question. Nevertheless, 8 C.F.R. § 103.2(b)(8) requires the issuance of a request for evidence only if there is no evidence of ineligibility in the record. The information regarding the beneficiary's educational record is *prima facie* evidence of ineligibility, and therefore a request for evidence to clarify the petitioner's ability to pay would have been moot.

On appeal, counsel does not rebut, contest, or even acknowledge, the director's finding regarding the petitioner's ability to pay the proffered wage. Therefore, the petitioner did not avail itself of the opportunity to overcome that finding by the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.